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RECENT DECISIONS AND DEVELOPMENTS

Church and State

Last December the New York Court of Appeals handed down a decision in the widely-publicized controversy between Brooklyn's Trinity Church and the Reverend William Melish.[1] The Court affirmed both a declaratory judgment establishing the co-plaintiff, Dr. Sidener, as lawfully elected rector and an injunction restraining Mr. Melish, the assistant minister, from interfering with the performance of Dr. Sidener's rectorial duties.

Six of the eleven vestry members of the Church had elected Dr. Sidener to serve as rector. Mr. Melish and three co-defendant vestrymen denied that the six electing vestry members constituted a quorum competent to act. In the New York Supreme Court the Official Referee applied the quorum provisions for vestry meetings, as prescribed by Section 42 of the New York Religious Corporations Law,[2] and found that the presence of two churchwardens and four vestrymen was insufficient lawfully to elect Dr. Sidener.[3]

In reversing, the Appellate Division discussed the constitutional relationship between Church and State and held that in a matter as purely ecclesiastical as the election of a rector, church canons alone govern.[4] However, the Court of Appeals, affirming, found it unnecessary to decide upon constitutional grounds. In its construction of the Religious Corporations Law the Court found deference to church law in the election of a rector.

The Court first examined Section 42. It found there no specific statement that the quorum rules applying to a vestry called for the election of a rector. To appellant's contention that the rule describing a quorum exclusive of the rector[5] demands the application of that quorum to a body electing a rector, the Court answered that that particular provision covered only the special circumstance of a rector in office refusing to call or attend a meeting. Moreover, the last sentence of Section 42[6] appeared to the Court to make the vestry's exercise of the power to call a rector subject to the General Canons of the American Church.

The Court then cited Section 25, which excludes from any coverage of the Religious Corporations Law the selection of a rector, to cement its conclusion that:

[1] Rector, Church of the Holy Trinity v. Melish, 3 N.Y.2d 476, 146 N.E.2d 685 (1957).

[2] "To constitute a quorum of the vestry or board of trustees, there must be present either:

1. The rector and at least a majority of the whole number of wardens and vestrymen, or
2. One churchwarden and one more than a majority of the vestrymen or both churchwardens and a majority of the vestrymen, or
3. If the rector be absent from the diocese and shall have been so absent for over four calendar months, or if the meeting be called by the rector and he be absent therefrom or be incapable of acting, one churchwarden and a majority of the vestrymen, or both churchwardens and one less than a majority of the vestrymen."

N. Y. RELIG. CORP. LAW §42.

[3] Rector, Church of the Holy Trinity v. Melish, 3 M.2d 997, 155 N.Y.S.2d 792 (Sup. Ct. 1956).

[4] Rector, Church of the Holy Trinity v. Melish, 4 A.D.2d 256, 164 N.Y.S.2d 843 (2d Dep't 1957).

[5] See the second rule of N. Y. RELIG. CORP. LAW §42, note 2 *supra*.

[6] "The vestry may, subject to the canons of the Protestant Episcopal church in the United States, and of the diocese in which the parish or church is situated, by a majority vote, elect a rector to fill a vacancy occurring in the rectorship of the parish, and may fix the salary or compensation of the rector." N. Y. RELIG. CORP. LAW §42.

> . . . on their face and in their setting and in the light of legislative history the quorum requirements of section 42 have no reference to the election of a rector, and that the only applicable law is the Canon Law of the Church.[7]

Section 2 of General Canon 11 of the Protestant Episcopal Church of the United States declares that, the whole having been called to meet, a majority of the members of a body shall constitute a quorum, and a majority of the quorum shall be competent to act. The Court found compliance with this canon and thus a valid election of Dr. Sidener.

The decision reached seems judicious in more than one respect. The construction made of Section 42 of the Religious Corporations Law, by which the civil regulation of an ecclesiastical matter was precluded, is consonant with that statute's purpose as pronounced in *St. Nicholas Cathedral v. Kedroff*.[8]

> . . . to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust.[9]

Since the raison d'être of the law is the protection of the property of religious groups, then the law would be misused in altering the result of a purely religious function.

Likewise, the decision seems constitutionally sound. Since the Episcopal Bishop had invested Dr. Sidener as rector, that canonical approval of the election would probably be binding on the courts if pleaded.[10] Had the constitutionality of Section 42 been in issue, it would probably have been upheld if construed as in the instant case: that its quorum regulations validly apply to vestry meetings called for the administration of church "property and temporalities," but do not apply to such meetings called for purely ecclesiastical matters.

Although the decision favors the right of a church to manage spiritual affairs free from civil regulation, since it confines itself to a construction of the statute it will probably not be controlling on any future Church-State issue.

The recent case of *Baer v. Kolmorgen*[1] presented another facet of the separation of Church and State controversy.

Petitioners sought to enjoin, pendente lite, the School Board of Ossining, New York, from authorizing the erection of a Nativity scene on public school property during the Christmas season. Petitioners contended that this would indicate to school children preference by school authorities toward the Christian religion. The New York Supreme Court denied the injunction on the ground that petitioners had not alleged such irreparable injury as would support a temporary injunction and indicated that any future litigation must be based on sufficient allegations of damage.

The due process clause of the Fourteenth Amendment includes the guarantee of freedom of religion contained in the First Amendment.[2] In construing this amendment, the Supreme Court has ruled that an action which supports or aids ". . . one

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[7] Rector, Church of the Holy Trinity v. Melish, 3 N.Y.2d 476, 481-82, 146 N.E.2d 685, 687 (1957).

[8] 302 N.Y. 1, 96 N.E.2d 56 (1950), *rev'd on other grounds*, 344 U.S. 94 (1952).

[9] *Id.* at 29, 96 N.E.2d at 72.

[10] Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). See also Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Gonzalez v. Archbishop, 280 U.S. 1 (1929).

[1] 170 N.Y.S.2d 40 (Sup. Ct. 1957).

[2] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

religion, . . . all religion, or prefer[s] one religion over another . . ." is violative of the constitutional guarantee.[3] Hence, appropriations to support a church,[4] or the use of tax-supported property for religious instruction,[5] is unconstitutional. On the other hand, released time for students attending religious instruction[6] and the traditional tax exemption,[7] not characterized as support, are valid.

The disjunction between support and non-support is not complete. Some acts which might easily be characterized as support have been justified on other grounds. Federal aid to a charitable hospital run by a religious corporation, for example, is valid since the legal character of a corporation, a secular institution, is not affected by the religious affiliations of its members.[8] Support of American Indian Catholic schools is valid under the Indian Treaty.[9] Likewise, the State's interest in education justifies giving secular textbooks to parochial schools;[10] its interest in the safety of its young citizens allows bus transportation to be provided for students attending parochial schools.[11] Application of the National School Lunch Act[12] to parochial schools may be similarly justified.[13] Such aid is given to citizens of the State, not to religion.[14]

In the *Baer* case the Court might easily have characterized the act in question as support. *McCollum v. Board of Education*[15] held religious instruction in public schools unconstitutional since it was the ". . . use of tax supported property for religious instruction. . . ."[16] By analogy, the present act might be struck down as the use of public property for the erection of a shrine of religious significance. The case is distinguishable, however, since the element of instruction, worship or propagation of religion is not actually involved.

Had the instant Court found support, an injunction would have issued.[17] But the plaintiff's bill was held insufficient as the damages alleged[18] were too vague and speculative to support an injunction.[19] It would seem, therefore, that while ostensibly leav-

[3] Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

[4] Everson v. Board of Educ., *supra* note 3, at 16 (dictum).

[5] McCollum v. Board of Educ., 333 U.S. 203 (1948).

[6] Zorach v. Clauson, 343 U.S. 306 (1952).

[7] Lundberg v. County of Alameda, 46 Cal.2d 644, 298 P.2d 1, *aff'd sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956) (per curiam).

[8] Bradfield v. Roberts, 175 U.S. 291 (1899).

[9] Quick Bear v. Luepp, 210 U.S. 50 (1908). The trust fund provided for by the treaty belongs to the Indians. Hence, they may validly petition for this appropriation.

[10] Cochran v. Board of Educ., 281 U.S. 370 (1930).

[11] Everson v. Board of Educ., 330 U.S. 1 (1947).

[12] 60 STAT. 230 (1946).

[13] See CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 192 (1954).

[14] See Everson v. Board of Educ., *supra* note 11, at 16-18. To deprive citizens of aid to which they are entitled when they choose to send their children to parochial schools would be discriminating against religion.

[15] 333 U.S. 203 (1948).

[16] McCollum v. Board of Educ., 333 U.S. 203, 209 (1948).

[17] Baer v. Kolmorgen, 170 N.Y.S.2d 40 (Sup. Ct. 1957). The Constitution guarantees citizens that the State shall not support any Church. An injunction will issue if petitioners show ". . . that some act is being done, threatened and imminent which will be destructive of plaintiff's rights. . . ." *Id.* at 42.

[18] *Id.* at 42. "'. . . the psychological and sociological effect of defendant's act is to indicate clearly in the minds of the child a preference by public school authorities of the Christian religion over other religions, and acceptance and endorsement as truth the dogma of the Christian religion, and a corresponding rejection of other religions.'" *Ibid.*

[19] *Ibid.*

ing the constitutional question open,[20] the Court, sub silentio, found that the act was not, on its face, support of religion.

The Court goes on, ". . . not . . . every friendly gesture between the Church and State should be discountenanced. . . ."[21] In advising that further litigation predicated upon the act complained of must be grounded upon ". . . sufficient allegations of damage. . . ,"[22] the Court implies that it is inclined to view such an act as merely a "friendly gesture."

The validity of acts which the Court characterizes as "friendly gestures" is established by authority and tradition.

The purpose of the constitutional guarantee is to preserve freedom of conscience.[23] As a corollary, the State has a negative obligation not to be hostile to religion.[24] Since absolute indifference on the part of the State toward religion is, in practical effect, rejection or hostility, the State should maintain a friendly, cooperative relation with religion.[25] Furthermore, the State has a positive obligation to preserve such friendly gestures. While primarily interested in different aspects of their subject's lives (social and spiritual respectively), since both sovereigns are concerned with the general good of their subjects – a practically indivisible good – cooperative intercourse is necessary for each to succeed.[26]

Traditionally, "we are a religious people whose institutions presuppose a Supreme Being."[27] The State favors religion through privileges[28] and encourages it by ordering secular events so as not to prevent the practice of one's religion.[29] On the positive side, many examples of "friendly gestures" suggest themselves: the motto "In God We Trust" on our coin; the invocation at legislative sessions; the oaths sworn in God's name by public officials; the maintenance of clergymen as chaplains for our armed forces; the churches and temples erected on military reservations.[30]

It is submitted that the act complained of in the principal case may properly be characterized as a friendly gesture. It is distinguishable from support cases in that the act contributed nothing postively and specifically to the preservation or propagation of religion.[31] It is, moreover, compar-

[20] *Id.* at 43.

[21] *Ibid.*

[22] *Ibid.*

[23] See Zorach v. Clauson, 343 U.S. 306, 313-14 (1952); Everson v. Board of Educ., 330 U.S. 1, 8-13 (1947).

[24] See Zorach v. Clauson, *supra* note 23, at 312-14; Everson v. Board of Educ., *supra* note 23, at 16, 18; Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880, 882 (1950), *appeal dismissed,* 342 U.S. 429 (1952).

[25] See Zorach v. Clauson, *supra* note 23, at 314. ". . . [C]allous indifference . . . would be preferring those who believe in no religion over those who do believe." *Ibid.*

[26] By cooperating with religious authorities, the State ". . . follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public services to their spiritual needs." Zorach v. Clauson, *supra* note 23, at 314. See also AQUINAS, SUMMA THEOLOGICA, I-II, q. 95, art. 3. "The end of human law is to be useful to man. . . ." It must, therefore, ". . . foster religion, inasmuch as it is proportioned to the divine law; . . . to be helpful to discipline, inasmuch as it is proportioned to the natural law; and . . . further the common welfare, inasmuch as it is proportioned to the utility of mankind." *Ibid.*

[27] Zorach v. Clauson, 343 U.S. 306, 313 (1952). See also Doremus v. Board of Educ., note 24 *supra.*

[28] See Note, 40 MINN. L. REV. 672, 678 (1956).

[29] Zorach v. Clauson, *supra* note 27, at 314.

[30] See examples in Zorach v. Clauson, *supra* note 27, at 312-15; McCollum v. Board of Educ., 333 U.S. 203, 254-55 (1948) (dissenting opinion); Doremus v. Board of Educ., 5 N.J. 435, 75 A.2d 880, 882-84 (1950).

[31] Compare the principal case with *McCollum v. Board of Education* where the Court objected to the use of public school property ". . . for the

able to those acts of cooperation which recognize religion without supporting it in the constitutional sense.[32] Furthermore, to prohibit such recognition would indicate a hostility by secular authorities which would be unconstitutional.[33]

Mass Bequests

A recent case may have resolved a possible ambiguity in the law governing the treatment of bequests for masses under Section 17 of the New York Decedent Estate Law and similar statutes in other states. In *Matter of Yadach*[1] the testator bequeathed his residuary estate to certain pastors for masses to be celebrated for the repose of his soul and that of his wife. These bequests aggregated more than half his net estate, even though he left sons surviving him. Section 17 of the Decedent Estate Law[2] provides that no more than half the net estate can be bequeathed "for religious purposes" if an objection is raised by a surviving parent, spouse, descendant, brother or sister. The Appellate Division, Third Department, held that the bequests for masses were within the provisions of Section 17, and reduced them in amount

Generally speaking mass bequests have been held to be bequests for religious purposes, although in England it was formerly held that such gifts were for superstitious purposes.[3] In Pennsylvania, under a statute similar to Section 17, mass bequests were treated as being within the statute. The Pennsylvania Supreme Court, in *Rhymer's Appeal,*[4] stated:

> It cannot be doubted that in obeying the injunction of the testator and offering masses for the benefit and repose of his soul the officiating priest would be performing a religious service, and none the less so because intercession would be specially invoked in behalf of the testator alone.[5]

A Massachusetts case, *Shouler, Petitioner,*[6] also held that mass bequests were gifts for a religious purpose. This view has been approved by dictum in a New York Court of Appeals decision.[7] In *Matter of Fleishfarb,*[8] a bequest for the saying of the *Yahrzeit,* a Jewish rite, for the benefit of testator's deceased wife, was held to be for religious purposes under Section 12 of the Personal Property Law. *In re Eppig's Estate*[9] made the same determination in construing Section 113 of the Real Property Law. Both of these statutes exempt gifts for religious purposes from the operation of the rule against perpetuities.

Prior to *Matter of Yadach,* however, there was no direct holding by any New

dissemination of religious doctrines . . ." and to the State aiding religion by ". . . providing pupils for religious classes." McCollum v. Board of Educ., *supra* note 30, at 212.

32 See McCollum v. Board of Educ., *supra* note 30, at 252-54 (dissenting opinion); Doremus v. Board of Educ., *supra* note 30, at 882-88.

33 By prohibiting this traditional recognition of an event of religious significance during the Christmas season, there would be an implied divorce of the State from religious sentiment. "Devotion to the great principles of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with the accepted habits of our people." McCollum v. Board of Educ., *supra* note 30, at 252-54 (dissenting opinion).

1 ___ A.D.2d. ___, 172 N.Y.S.2d 340 (3d Dep't 1958).

2 N.Y. DECED. EST. LAW §17.

3 HANNAN, CANON LAW OF WILLS §646 (1st ed. 1935).

4 93 Pa. 142 (1880).

5 *Id.* at 146.

6 134 Mass. 426 (1883).

7 Matter of Morris, 227 N.Y. 141, 124 N.E. 724 (1919).

8 151 Misc. 399, 271 N.Y. Supp. 736 (Surr. Ct. 1934).

9 63 Misc. 613, 118 N.Y. Supp. 683 (Surr. Ct. 1909).

York appellate court that mass bequests were gifts "for religious purposes" under Section 17 of the Decedent Estate Law. Indeed, there seemed to be some confusion on this point, mainly resulting from the decisions in *Matter of Brown*[10] and *Matter of Breckwolt,*[11] both decided by Surrogate Wingate of Kings County.

In the *Brown* case, the court held that mass bequests were not gifts for religious purposes under Section 17.[12] The opinion cited *Matter of Zimmerman,*[13] which held that mass bequests to individual priests, in trust or otherwise, were not gifts to religious or charitable *organizations.* The *Zimmerman* case was decided prior to the amendment of Section 17,[14] which inserted the "religious purposes" clause. In *Matter of Breckwolt,*[15] the court attempted to justify its position in the *Brown* case by drawing a distinction between a bequest for the promotion of religion as a whole and one for a selfish purpose (the repose of the testator's soul). Yet, two years before, the same court had held, in *Matter of Steiner,*[16] that a bequest for the saying of *Yahrzeit* was for a religious purpose under Section 12 of the Personal Property Law, even though the testator named those who were to benefit from the ceremony. The inconsistencies in these opinions are obvious.

[10] 135 Misc. 611, 238 N.Y. Supp. 160 (Surr. Ct. 1929).

[11] 176 Misc. 549, 27 N.Y.S.2d 938 (Surr. Ct. 1941).

[12] Matter of Brown, 135 Misc. 611, 238 N.Y. Supp. 160 (Surr. Ct. 1929).

[13] 22 Misc. 411, 50 N.Y. Supp. 395 (Surr. Ct. 1898).

[14] Laws of N. Y. 1923, c. 301.

[15] 176 Misc. 549, 27 N.Y.S.2d 938 (Surr. Ct. 1941).

[16] 172 Misc. 950, 16 N.Y.S.2d 613 (Surr. Ct. 1939).

The decision of the Court in the present case is supported by the weight of authority. The courts recognize no distinction between masses for the repose of the souls of particular people and those for the promotion of religion in general. The confusion engendered in this area by the *Brown, Breckwolt* and *Steiner* cases has probably been dispelled, not only in New York, but also in those states which have statutes somewhat similar to Section 17.[17] It would be well, therefore, when drafting wills providing for bequests for masses, to refer to statutes which place limitations on gifts for religious purposes. Since such bequests would be for laudable ends, every attempt should be made to effectuate the testator's intent.

Prior Restraint

The film "Lady Chatterly's Lover" furnished the occasion for the New York Court of Appeals' most recent pronouncement in the uncertain area of administrative censorship of motion pictures.[1] The Appellate Division had annulled a determination by the Board of Regents denying a license to exhibit the film under Section 122-a of the Education Law, which requires a denial of a license to films which portray sexual immorality as desirable behavior. In revers-

[17] The following statutes similar to Section 17 place some restriction on bequests for religious or charitable purposes:

CALIF. PROB. CODE ANN. §§40-43 (West 1956); FLA. STAT. ANN. §731.19 (Supp. 1957); GA. CODE ANN. §113-104 (Supp. 1955); IDAHO CODE ANN. §14-326 (1948); IOWA CODE ANN. §633.3 (1950); MASS. ANN. LAWS c. 68, §9 (1953); MISS. CODE ANN. §671 (1943); MONT. REV. CODES ANN. §91-142 (1949); OHIO REV. CODE ANN. §2107.06 (Baldwin 1953); PA. STAT. ANN. tit. 10, §17 (Supp. 1957).

[1] Kingsley Pictures Corp. v. Regents, 19 LAW REP. NEWS No. 38, p. 1, col. 2 (N.Y. Ct. App. May 15, 1958).

ing the order of the Appellate Division, the Court held, with three dissents, that since Section 122-a was not unconstitutional, either on grounds of vagueness or as an invalid prior restraint, the license to exhibit the film was properly denied.

Chief Judge Conway, in an opinion concurred in by Judges Froessel and Burke, stressed the distinction between the motion picture and other media of communication — a distinction rooted in a capacity for harm to the public order that warrants unique remedial measures and standards. Relying on a test based on the net effect of Section 122-a in operation, considered through "close analysis" and "pragmatic assessments" similar to that laid down by the Supreme Court,[2] Chief Judge Conway found that the net effect of a film is the same whether it contains a dominance of suggestive scenes or fewer such scenes presented as desirable conduct. Both are dangerous to the moral tone of society and can be censored, and since the pernicious influence of such films on the social order is inherent in them, no clear and present danger to society need be proved before a license to exhibit the film can be denied.

In a separate opinion, Judge Desmond confessed a doubt as to the constitutionality of Section 122-a but concurred because the United States Supreme Court has never passed on a similar statute; he added that if it were unconstitutional, it would be the function of the Supreme Court to so hold.

Judges Dye and Fuld not only believed the statute to be too vague, but also emphasized that prior restraint of films should not be permitted where it would not be tolerated if books were involved. Judge Van Voorhis also considered the statute to be too indefinite but implicitly recognized the validity of some censorship insofar as he recommended remand to the Regents to remove obscene parts.

The area of administrative censorship of films has been marked by much uncertainty since *Burstyn v. Wilson*[3] afforded to motion pictures the protection of the First Amendment, which had theretofore been denied to them.[4] In that case the United States Supreme Court expressly reserved judgment on whether a state could, under a clearly drawn statute, prevent the showing of obscene films.[5] The result has been much litigation involving the constitutionality of particular licensing statutes, during the course of which the Supreme Court has struck down censorship predicated on the ground that a film is "immoral"[6] or that it tends to "debase and corrupt morals"[7] or that it is not of a moral, educational, or amusing and harmless character.[8] The attitude of the Supreme Court in the cases that have arisen has led some to believe that no prior restraint of films should be permitted, but the Supreme Court has never

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[2] Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

[3] 343 U.S. 495 (1952).

[4] Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915). This case did not treat motion pictures as akin to the press and hence excluded them from the protection of the First Amendment.

[5] Burstyn v. Wilson, 343 U.S. 495, 505-06 (1952).

[6] Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954) (per curiam), *reversing* 305 N.Y. 336, 113 N.E.2d 502 (1953). The New York court had construed "immoral" as relating to sexual immorality but the Supreme Court did not permit this construction to save the statute.

[7] Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (per curiam), *reversing* 177 Kan. 728, 282 P.2d 412 (1955).

[8] Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (per curiam), *reversing* 159 Ohio St. 315, 112 N.E.2d 311 (1954).

expressly so held. In fact, it has hinted to the contrary.[9]

In *Near v. Minnesota,*[10] the Supreme Court declared that the exceptions to the rule of no prior restraint include that type of speech which hinders the conduct of a war, seditious speech, and speech which goes contrary to the primary requirements of decency.[11] In *Beauharnais v. Illinois*[12] the Court, sustaining a conviction for group libel, stated that libelous speech is not within the protection of the First Amendment.[13] In *Roth v. United States,*[14] obscenity was held to be without the protection of the Constitution, with the result that a clear and present danger to society caused by the obscenity did not have to be proved.

Lastly, in *Chaplinsky v. New Hampshire*[15] the Supreme Court said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous. . . . [S]uch utterances . . . are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[16]

Moreover, the Court has recognized that motion pictures can raise special problems and hence are not necessarily subject to the criteria that are applicable to other means of communication.[17] Its policy of testing the constitutionality of specific statutes case by case, rather than flatly declaring that all forms of licensing are unconstitutional, bolsters the conviction that different standards are applicable to motion pictures.[18]

It should be noted that the distinction relied on by Judge Fuld (who upheld the use of the injunction in a prior case[19] but opposed administrative censorship in the principal case) between judicial and administrative prior restraint, does not appear sufficient to warrant holding Section 122-a unconstitutional.[20] To determine if a particular licensing statute is constitutional the Supreme Court has relied on a test based on the net effect of the operation of the statute, regardless of its administrative or judicial provisions.[21]

However, since the Supreme Court has thus far failed to sustain a determination made under a film licensing statute, it would appear that to comply with the tenor of the Supreme Court opinions, censorship must be very closely confined. The convictions that have been sustained have been under subsequent punishment statutes.[22] Even in cases where a conviction has been sustained, there have been strong dissents

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[9] Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931).

[10] 283 U.S. 697 (1931).

[11] Near v. Minnesota, 283 U.S. 697, 716 (1931).

[12] 343 U.S. 250 (1952).

[13] Beauharnais v. Illinois, *supra* note 9, at 260.

[14] 354 U.S. 476 (1957).

[15] 315 U.S. 568 (1942).

[16] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[17] Burstyn v. Wilson, 343 U.S. 495, 502-03 (1952).

[18] See Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROB. 648 (1955).

[19] See Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 134 N.E.2d 461 (1956).

[20] See Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441-42 (1957); Near v. Minnesota, 283 U.S. 697, 713 (1931); Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 539 (1951).

[21] Near v. Minnesota, 283 U.S. 697 (1931).

[22] Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

and carefully worded concurring opinions.[23]

A problem would seem to arise, in view of the *Roth* case,[24] as to whether obscenity is the only ground upon which a censoring statute could be sustained. This was Judge Desmond's position in the *Excelsior Pictures* case,[25] but in the present case he concedes that censorship may be on grounds other than the dictionary definition of obscenity.[26] The *Roth* case framed a definition of obscenity based on the dominant appeal of an object to the prurient interest,[27] and it may be argued that "Lady Chatterly's Lover" does not fall within the scope of this definition. However, when the fact that the *Roth* case did not hold obscenity to be the only ground is considered in relation to the approach taken by the Supreme Court in the *Kingsley Books* case,[28] it would appear that a film could constitutionally be banned although not within the strict purview of the prurient interest test. The *Kingsley Books* case stressed the fact that words like "prior restraint" could not be regarded as "talismanic tests."[29] In that case the Court found that an injunction operated similarly to permissible criminal statutes. It is conceivable that "prurient interest" may be similarly treated and due consideration given by the Supreme Court to the practical effect of a given statute and the needs of society. Certainly, the emphasis which the majority placed on the distinction between films and other means of communication can be used to distinguish general statements, made in cases not involving films, from the case at hand.

While the tenor of some Supreme Court opinions cannot be ignored,[30] it seems not enough to warrant Judge Desmond's pessimism. The statute in the principal case appears to be confined sufficiently, leaving a minimum of discretion to the censor, and hence should withstand the challenge of unconstitutionality before the United States Supreme Court if the present case is appealed.

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[23] See Roth v. United States, *supra* note 22, at 494, 496, 508; Kingsley Books, Inc. v. Brown, *supra* note 19, at 445, 446, 447. The tenor of these opinions renders the outcome of any test of a licensing statute at best uncertain.

[24] Roth v. United States, note 22 *supra*.

[25] Excelsior Pictures Corp. v. Regents, 3 N.Y.2d 237, 144 N.E.2d 31 (1957). In the controversial "Garden of Eden" case the Court of Appeals annulled action by the Regents denying a license to the film on the ground that it was indecent. This was regarded as too vague to serve as a constitutional standard of censorship; since the film was deemed not obscene by the majority it could not be banned. The majority regarded obscenity as the only ground upon which films could be censored.

[26] Kingsley Pictures Corp. v. Regents, 19 LAW REP. NEWS No. 38, p. 1, col. 2 (N.Y. Ct. App. May 15, 1958) (concurring opinion of Desmond, J.).

[27] Roth v. United States, 354 U.S. 476, 489 (1957).

[28] See Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). The Court said that the use of an injunction to prevent the distribution of obscene literature was not violative of the Fourteenth Amendment. The Court examined the net operation of the statute and found that its effect was not substantially different from that of permissible subsequent punishment statutes.

[29] *Id.* at 441.

[30] The dissents in the *Kingsley Books* case emphasized that an injunction would deprive the defendants of a right to a jury trial. *Id.* at 445, 446, 447. The New York Court of Appeals had indicated that since the offense was a misdemeanor the defendants had no constitutional right to a jury trial. Brown v. Kingsley Books, 1 N.Y.2d 177, 134 N.E.2d 461 (1956). But see, Times Film Corp. v. Chicago, 355 U.S. 35 (1958) (per curiam), *reversing* 244 F.2d 432 (7th Cir. 1957).